No. 00-795

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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As we explain in our petition, certiorari is warranted in this case because the court of appeals invalidated two important provisions of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. 2251 *et seq.* In particular, the court of appeals held unconstitutional the provisions of the CPPA that define child pornography to include (1) any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(B) (Supp. IV 1998), and (2) any visual depiction that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D) (Supp. IV 1998). Certiorari is also warranted because the court's holding is incorrect and conflicts with the decisions of three other circuits, *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999); *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999); and *United States* v. *Mento*, 231 F.3d 912 (4th Cir. 2000).

1. Respondents contend (Br. in Opp. 21) that the Court should not grant review because "the court's ruling excised only two limited portions of the statute, leaving the remaining portions of the CPPA in full effect." Respondents' effort to downplay the significance of the court's sweeping ruling ignores the central purpose of the amendments Congress enacted in the CPPA.

The CPPA contains four definitions of child pornography. The decision below entirely invalidates two of those four definitions, and those definitions are the only ones that address the serious dangers to children posed by computer-generated child pornography not involving real children. The two invalidated definitions respond to Congress's specific findings that computer-generated child pornography not involving real children can be used just as effectively by pedophiles to seduce children into sexual activity and to incite their own abusive behavior as child pornography depicting real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Findings 3, 4, 8, 9 and 10). They also respond to Congress's determination that prohibitions against dissemination and possession of child pornography involving real children may soon become effectively unenforceable. S. Rep. No. 358, 104th Cong., 2d Sess. 20 (1996).

Respondents' assertion (Br. in Opp. 21) that Congress's purposes can be fully achieved through the two definitions that are unaffected by the court's ruling is incorrect. The two unaffected definitions address the use of real children in visual depictions of sexually explicit conduct. See 18 U.S.C. 2256(8)(A) (Supp. IV 1998) (defining child pornography as any visual depiction that "involves the use of a minor engaging in sexually explicit conduct"); 18 U.S.C. 2256(8)(C) (Supp. IV 1998) (defining child pornography as any visual depiction that "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct"). Those definitions either duplicate or mod-

estly expand prohibitions that existed before the enactment of the CPPA. See 18 U.S.C. 2251, 2252. They do nothing to address the dangers posed by computer-generated child pornography that either does not involve real children or that cannot be proven to involve real children.

2. Respondents also contend (Br. in Opp. 24-26) that there is no "actual" conflict in the circuits on the question presented in this case. According to respondents, the decisions in *Hilton*, *Acheson*, and *Mento* contain only "dicta" on the constitutionality of the CPPA. Respondents are mistaken.

In *Hilton*, the district court dismissed an indictment charging the defendant with knowing possession of child pornography, in violation of the CPPA, on the ground that the "appears to be" definition in the CPPA is unconstitutionally vague and overbroad. 167 F.3d at 65, 67. The government appealed, and the sole questions presented were "whether the CPPA's definition of child pornography is so overbroad as to contravene the First Amendment or so vague as to violate due process." *Id.* at 65. The First Circuit squarely resolved those questions on the merits, summarizing its decision as follows: "We hold that the law, properly construed, survives Hilton's facial constitutional challenge. It neither impinges substantially on protected expression nor is so vague as to offend due process." *Ibid.*

In *Acheson*, the defendant pleaded guilty to knowingly receiving and possessing child pornography, in violation of the CPPA, but reserved the right to appeal to challenge the constitutionality of the Act. 195 F.3d at 648. On appeal, the defendant did not contend that he was personally engaged in conduct protected by the First Amendment. *Id.* at 650. Instead, he argued that the CPPA's "appears to be" language renders the CPPA unconstitutionally overbroad and vague and that the district court therefore should have dismissed his indictment. *Id.* at 650, 652. The Eleventh

Circuit entertained the defendant's claims and rejected them on the merits, holding that "[t]he CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep," *id.* at 650, and that "the CPPA defines the criminal offense with enough certainty to put an ordinary person on notice of what conduct is prohibited," *id.* at 652.

In *Mento*, the defendant pleaded guilty to possessing child pornography, in violation of the CPPA, but reserved the right to appeal the district court's holding that the CPPA is facially constitutional. 231 F.3d at 915. The Fourth Circuit expressly rejected the defendant's contention that the "appears to be" definition renders the CPPA unconstitutionally overbroad and vague. *Id.* at 921-922. It summarized its decision as follows: "We hold that the CPPA does not impermissibly regulate protected speech and does not, therefore, offend the First Amendment." *Id.* at 923.

Thus, the courts in *Hilton*, *Acheson*, and *Mento* all squarely held that the "appears to be" definition does not render the CPPA facially overbroad or vague. In contrast, the decision below invalidated the "appears to be" definition as unconstitutionally overbroad and vague. Pet. App. 2a. There is therefore a square conflict between the decisions in *Hilton*, *Acheson*, and *Mento* and the decision below.

Respondents assert (Br. in Opp. 25-26) that the constitutional rulings in *Hilton*, *Acheson*, and *Mento* are dicta, because the defendants in those cases possessed (or at least did not dispute that they possessed) visual depictions of real children. None of those courts, however, ruled against the defendant on that ground. Instead, applying settled First Amendment principles, all three courts entertained the defendant's *facial* challenge to the validity of the CPPA, and ruled against the defendant based on a determination that the CPPA is not facially overbroad or vague. Those constitutional rulings therefore constitute square holdings; they do not remotely fall into the category of dicta.

3. Finally, respondents argue (Br. in Opp. 9-20) that the decision below is correct. Respondents' arguments, however, do not demonstrate that the provisions at issue here are unconstitutional, much less that a conflict in the circuits on the constitutionality of an Act of Congress should not be resolved by this Court.

a. Respondents argue (Br. in Opp. 11-12, 14) that *New York* v. *Ferber*, 458 U.S. 747 (1982), holds that the government's compelling interest in regulating child pornography is limited to works involving real children. Respondents derive their reading of *Ferber* from a sentence in the opinion stating that the government's interest is "limited to works that *visually* depict sexual conduct by children below a specified age." 458 U.S. at 764. On its face, however, that sentence does not draw a distinction between pictures of real children and computer-generated images of participants who appear to be children.

Nor does anything else in *Ferber* suggest that the Court intended to prevent Congress from addressing the serious dangers posed to children by computer-generated child pornography. In *Ferber*, the State asserted as its sole interest the prevention of psychological harm to children who are involved in the production of child pornography. Moreover, at the time of *Ferber*, the technology for producing computer-generated images that are virtually indistinguishable from pictures of real children had not yet developed. The Court in *Ferber* therefore had no occasion to decide whether the new dangers to children associated with computer technology could justify prohibitions like those at issue here.

While *Ferber* did not resolve that question, its general framework provides strong support for the constitutionality of the CPPA's prohibitions. The Court identified the compelling interest at issue in that case as the "prevention of sexual exploitation and abuse of children." 458 U.S. at 757.

That interest is advanced by prohibitions against the dissemination and possession of depictions that "appear to be" children engaged in sexually explicit conduct or that "convey[]" such an "impression." As Congress found, pedophiles can use computer-generated child pornography not involving real children as effectively as child pornography involving real children to seduce children into sexual activity and to whet their appetites for sexual abuse. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 8). Moreover, advancing technology makes it increasingly difficult, if not impossible, to prove that a pornographic image involves a real child. S. Rep. No. 358, *supra*, at 20. Accordingly, prohibitions against dissemination and possession of pornographic depictions that appear to be of children or that convey that impression may often be the only effective way to reach persons who disseminate or possess pornography involving real children. Thus, as three courts of appeals have concluded, the prohibitions at issue here are fully consistent with *Ferber*. See *Hilton*, 167 F.3d at 71-73; *Acheson*, 195 F.3d at 651-652; *Mento*, 231 F.3d at 919-921; see also *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990) (one interest supporting a prohibition against possession of child pornography is preventing pedophiles from using pictures of child pornography to seduce children into sexual activity).

b. Respondents also argue (Br. in Opp. 13-14) that there is no evidence to support Congress's findings that prohibitions against computer-generated child pornography advance the government's compelling interest in preventing harm to children. In particular, respondents argue that evidence that pedophiles use child pornography to seduce children into sexual activity and to whet their own appetites for sexual abuse is insufficient to support the prohibitions at issue here, absent specific evidence that pedophiles use computer-generated images as opposed to images of real children to accomplish those purposes. But Congress had

evidence before it, and respondents do not dispute, that computer technology can be used to produce visual depictions "that are virtually indistinguishable from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 5). Congress could rely on that evidence to conclude that computer-generated images in the hands of pedophiles pose precisely the same dangers to children as pictures of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Findings 8, 9). Indeed, it would be difficult to reach any other conclusion.

For similar reasons, respondents err in contending (Br. in Opp. 6) that there is an insufficient evidentiary basis for Congress's finding that persons who possess and disseminate pornographic images of real children may escape prosecution unless they are prosecuted under the prohibitions at issue here. That conclusion is also supported by Congress's finding that computer-generated images can be produced that are virtually indistinguishable from images of real children. As a matter of logic, when the government's evidence consists of the images themselves, a defendant will almost always be able to argue that there is a reasonable doubt concerning whether the images are of real children or of participants who only appear to be children.

c. Respondents also err in contending (Br. in Opp. 14) that the prohibitions at issue here are not narrowly tailored. Those prohibitions are narrowly tailored to address the dangers that flow from computer-generated images of child pornography that are virtually indistinguishable from images involving real children. Respondents identify no less restrictive alternative that would address those dangers as well.

d. Respondents argue (Br. in Opp. 15-17) that the provisions at issue here are unconstitutionally vague. According to respondents (*id.* at 16), the Act leaves a person wondering

"Appears to whom to be a minor?" That criticism is unpersuasive.

First, the relevant inquiry under the "appears to be" provision is whether "a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." *Hilton*, 167 F.3d at 75; *Acheson*, 195 F.3d at 652; see also *Mento*, 231 F.3d at 922. In a large core of cases, the physical characteristics of the depicted participants will match the physical characteristics of prepubescent children. In such cases, a person can have no difficulty understanding that the depictions are prohibited. Second, the CPPA's scienter requirement further reduces any danger that the Act will serve as a trap for the unwary. Unless the government can prove that the defendant knew that the child appeared to be under the age of 18, the defendant must be acquitted. *Hilton*, 167 F.3d at 75 (citing 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 1998)); *Acheson*, 195 F.3d at 653. Respondents' vagueness argument ignores both of those features of the Act.

For similar reasons, the "conveys the impression" provision is not unconstitutionally vague. The relevant inquiry is also easily understood: the question is whether a reasonable unsuspecting viewer would conclude from the way the depiction is advertised, promoted, presented, described, or distributed that the person depicted is under the age of 18. In most cases, that inquiry can be readily answered. In addition to the physical characteristics of the participants, the language used to market the depiction will help to establish whether the applicable standard is satisfied. *Cf. Ginzburg* v. *United States*, 383 U.S. 463 (1966) (holding that the government may prosecute a business for engaging in the "pandering" of sexually explicit materials). And the scienter requirement further narrows the prohibition to those who know that the material has been marketed in a

prohibited manner. 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 1998).

e. Respondents also contend (Br. in Opp. 17-20) that the Act is unconstitutionally overbroad because it reaches visual depictions of what appear to be children engaged in sexual activity even when such depictions are necessary for literary or artistic value. That concern is misguided. The Act is aimed at visual depictions of children engaged in sexually explicit conduct. A large core of that material has no serious literary or artistic value. Moreover, the Act does not reach drawings, cartoons, sculptures, and paintings that depict youthful-looking persons in sexual poses. *Hilton*, 167 F.3d at 72; *Mento*, 231 F.3d at 922. And the Act also supplies an affirmative defense for persons who disseminate visual depictions involving adults who appear to be children provided that such material is not marketed as child pornography, 18 U.S.C. 2252A(c) (Supp. IV 1998). Because the Act is aimed at a large core of material that has no serious literary or artistic value, and leaves open ample opportunities for the creation of sexually explicit works having serious literary or artistic value, the Act is not substantially overbroad. *Ferber*, 458 U.S. at 773-774; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).

Respondents argue (Br. in Opp. 18) that the Act does reach drawings, cartoons, sculptures, and paintings of youthful-looking persons in sexually explicit poses. Respondents' expansive reading of the Act, however, is unjustified. As Congress's findings demonstrate, Congress understood the terms "appears to be a minor" and "conveys the impression" of a minor to refer to depictions that are virtually indistinguishable from unretouched photographs of real children. 18 U.S.C. 2251 note (Supp. IV 1998) (Finding 5). Drawings, cartoons, sculptures and paintings of youthful-looking persons engaged in sexual activity do not satisfy that

standard. The Act therefore does not cover such artistic works. *Hilton*, 167 F.3d at 72; *Mento*, 231 F.3d at 922.

Respondents' objections (Br. in Opp. 19-20) to the affirmative defense for distributors are also unpersuasive. Respondents argue (*id.* at 19) that the affirmative defense for distributors does not protect artists who create sexually explicit images out of their imaginations. But such artists have the option of either (1) creating drawings, cartoons, sculptures or paintings, or (2) using adults as models, provided that they do not market the depictions as child pornography. For similar reasons, the Act's failure to afford an affirmative defense to persons who do not know how an image is created (*ibid.*) does not demonstrate substantial overbreadth. Such persons can distribute and possess drawings, cartoons, sculptures, and paintings, and distribute depictions that they know involve adults and are not marketed as child pornography. See 18 U.S.C. 2257 (requiring producers of matter containing visual depictions of sexually explicit conduct to create and maintain records pertaining to each of the performers in such depictions to ensure that they are not minors).

In sum, the Act is not substantially overbroad. Whatever overbreadth may exist can be cured through case-by-case adjudication. *Ferber*, 458 U.S. at 774; *Broadrick*, 413 U.S. at 615- 616.

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For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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